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No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1942

MURRAY R. SPIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

499194—42——1

Miscellaneous—Continued. Page

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OPINIONS BELOW

The District Court rendered no opinion. The *per curiam* opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 429) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1942. (R. 430.) A petition for a writ of certiorari was filed August 3, 1942, and granted October 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the failure to file an income tax return and pay the tax due with the willful intent to evade and defeat the tax constitutes an offense under Section 145 (b) of the Revenue Act of 1936.[1]

2. Whether the trial court sufficiently and correctly instructed the jury with respect to the element of willfulness as it relates to the evidence regarding the petitioner's physical condition at about the time of the offense.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix A, *infra*, pp. 43–45.

STATEMENT

Murray R. Spies, the petitioner, was indicted in the Southern District of New York on a charge of willfully attempting to evade and defeat an income tax of $8,841.63 due upon a net income of $50,587.11, on or before June 15, 1937, for the calendar year 1936.

[1] This question is raised by the petitioner in connection with the propriety of the charge of the trial court, the sufficiency of the evidence and the sufficiency of the indictment.

The indictment alleged that during 1936 and to June 15, 1937, the petitioner's legal residence was within the First Internal Revenue Collection District of New York; that he maintained his office and principal place of business in the Second Internal Revenue Collection District, in the Southern District of New York; that during such year the petitioner received a net income of $50,587.11, on which he owed to the United States an income tax of $8,841.63; that the petitioner was required, on or before March 15, 1937, to make an income tax return, under oath, and to pay at least one-fourth of such tax to one of the Collectors of Internal Revenue for one of the said districts; and that the petitioner, upon application, was allowed until June 15, 1937, within which to file such return and to make such payment or payments. (R. 5–6.) The "charging part" of the indictment then alleged (R. 6–7):

> That the said MURRAY R. SPIES, the defendant herein, well knowing all the premises aforesaid and being indebted to the United States in the amount aforesaid by reason of the said tax imposed by the said Act of Congress, did on or about the said 15th day of June, 1937, at the Southern District of New York and within the jurisdiction of this Court, wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat the said tax in the said sum of approximately $8,841.63 upon his said net income for the said calendar year ending

December 31, 1936, and *as a means* of so wilfully attempting to evade and defeat the said tax did then and there wilfully and knowingly fail to make an income tax return for the said calendar year as required by the said Revenue Act, or any income tax return for the said period, on or before the said 15th day of June, 1937, or at any other time to the said Collector of Internal Revenue for the said Second Internal Revenue Collection District who maintained his office in the City, State and Southern District of New York and within the jurisdiction of this Court, or to the Collector of Internal Revenue for the First Collection District aforesaid, or to any other collector or proper officer of the United States, and he did then and there and at all times herein mentioned wilfully fail to pay to either of the said Collectors of Internal Revenue or to any other proper officer of the United States any sum of money on account of the said tax debt for the said calendar year; * * *. [Italics supplied.]

After the jury was impaneled and sworn the petitioner moved to dismiss the indictment on the ground that it did not allege any affirmative act and hence did not charge any offense under Section 145 (b) of the Revenue Act of 1936, which motion was denied. (R. 9–15.) At the end of the Government's case the petitioner's motion to dismiss the indictment was renewed (R. 128–129) and denied (R. 132).

The petitioner is an attorney-at-law, a member of the New York bar. (R. 134–135.) In 1936 he was associated with certain companies in the investment trust field, acted as a voting trustee under a trust indenture and was employed by certain of the companies under employment and commission contracts. (R. 67–69, 135, 139–140.) On June 11, 1936, the petitioner entered into a contract whereby he resigned as trustee and surrendered all interests in the companies under the contracts or otherwise in return for the payment of $40,000. (R. 16–17, 67–70, 139–140.)

The attorney for the purchasing interests testified that after the signing of the agreement the method of payment was discussed. The petitioner at that time stated that he did not want a check, he wanted cash. (R. 18.) Accordingly, representatives of the purchasers and the petitioner proceeded from the petitioner's office in New York to a New York bank. There a bank treasurer's check payable to Donald P. Kenyon, the principal purchaser, and endorsed by him was cashed and the cash given to the petitioner. (R. 18–19, 20–21.) At the request of the petitioner arrangements were then made in the bank for the transportation of the cash by armored truck. (R. 21–22.) Of the cash $38,000 was carried by armored truck to the Lynbrook Bank & Trust Company, Lynbrook, Long Island. (R. 25–28, 71, 143.) This amount was there deposited in an existing account in the name

of Marie V. Spies, the petitioner's wife, in trust, for Murray Robert Spies, Jr., a son. (R. 88, 143.) The balance of $2,000 was loaned to an associate of the petitioner. (R. 71, 142, 258.) At the time of this transaction the petitioner had an existing account in his own name in another New York bank. (R. 71, 74.)

On June 16, 1936, $33,000 of the $38,000 payment was withdrawn from the account in which it was originally deposited and was divided and deposited in seven accounts standing in the name of the petitioner's wife or in her name in trust for the petitioner's sons. Two of these accounts were opened with these deposits. (R. 88–89, 91, 143–144.) On July 25, 1936, $25,000 of this money was withdrawn from various of these accounts, including the two new accounts, and was invested in an insurance company annuity policy in the petitioner's name. (R. 88–91, 144.)

Late in February or early in March of 1937, the petitioner engaged an accountant to prepare his income tax return for 1936. At that time the petitioner gave the accountant no definite information as to his income but was to furnish the information later. On March 11, 1937, the petitioner requested the accountant to secure an extension of time within which to file the return, the accountant made the application and an extension to April 15, 1937, was granted. (R. 44–45.) On March 15, 1937, as a matter of office routine, the

accountant mailed to the Collector a tentative return for 1936 in the petitioner's behalf. The accountant did not recall how the tentative return was signed. (R. 48–49.) Subsequent to April 14, 1937, the accountant again applied for an extension of the time for filing a return and a second extension to June 15, 1937, was granted: (R. 45.) The accountant discussed the matter of the preparation of the return with the petitioner four times, at the time of the original employment, at the time of each application for an extension, and at the time of the expiration of the final extension. In these conversations the petitioner disclosed that he had income in 1936, a discussion was had as to deductions and at one time the petitioner might have asked for a rough calculation of an amount of tax. At no time, however, did the petitioner give the accountant definite information as to his income and deductions or supply any records or figures. (R. 45, 47, 49–53.) After the expiration of the second extension the accountant withdrew from the matter. (R. 47.)

At no time did the petitioner file any final income tax return for 1936 or pay any tax for that year. The office of the Collector of Internal Revenue contained no record of the filing of any tentative return for that year. On April 15, 1936, the petitioner had filed a final income tax return for the year 1935. (R. 39–42, 44, 381.)

In February of 1937 the petitioner became interested in a new investment trust venture. An initial investment in the project of $1,500 was made by the petitioner. In April of 1937 he and his wife entered into an agreement for the investment by them of $11,000. Additional investments were subsequently made by the petitioner in the venture, all of the investments totalling between $15,000 and $20,000. All of the investments, except a small advance made in December, 1936, were made in 1937. (R. 151, 182–186.) Beginning on July 1, 1937, the petitioner obtained bank loans by pledging as collateral the annuity policy purchased in July of 1936. At the end of December, 1937, the bank loans totalled $22,700. (R. 54–57.) This money was borrowed to meet the investment obligation. (R. 152.) The investment trust project failed late in 1937 or early in 1938. (R. 157, *cf.* R. 339–340.) On August 5, 1938, the petitioner's bank loans were unpaid and the annuity policy posted as collateral was sold by the bank. (R. 56–57.) As late as August 30, 1937, however, the petitioner stated in writing in connection with an application for a mortgage loan on the purchase of a house that his net worth was $40,000. (R. 256–258.)

In April of 1939 an examination of the petitioner's income taxes for 1936 was begun by internal revenue agents. Thereafter the petitioner on request of the agents turned over to them cer-

tain records relating to bank accounts in his own name or in the names of members of his family. The petitioner stated that all of these accounts were under his control. (R. 58–65, 76.) On the basis of these records and records secured from the banks the investigating Revenue Agent made an analysis of the bank deposits of the petitioner in 1936. (R. 71–75.) This analysis showed total deposits by the petitioner of approximately $99,000. Approximately $48,000 of these were identified as transfers between the accounts. Various other items were found subject to explanation and eliminated. A balance of approximately $10,000 of the deposits remained entirely unexplained. (R. 80–85.) The list of unexplained deposits was shown to the petitioner and on three occasions the opportunity was offered to him to explain their source. He was unable at any time to explain the deposits. (R. 119, 120–121.) On the basis of his investigation the Revenue Agent concluded that the petitioner had net income in 1936, inclusive of the unexplained bank deposits, of $50,587.11 on which a tax of approximately $8,000 was due. (R. 86–87.)

The petitioner conceded at the outset of the trial that he had an income of $40,000 in 1936, on which a tax of approximately $6,000 was due. (R. 15.) In testifying in his own behalf he sought to explain his request for the payment of the $40,000 in cash and its deposit in his wife's account but his

explanation as to the deposit varied from a prior explanation given to the Government agents. (R. 143, 160–163.) He further stated that at the time of the transaction a check for $40,000 payable to his order had been delivered to him and had been endorsed by him and returned to the purchasers. (R. 141–143.) No record existed, however, of this check ever having become operative and in fact one witness testified that the check never cleared. (R. 19–20, 22–23, 113–116, 159, 287–289.) As to the splitting up of the bulk of the payment among a number of bank accounts the petitioner explained that it was done to come within the maximum limit of federal deposit insurance. (R. 143–144.) The petitioner likewise offered a specific explanation for certain of the unidentified bank deposits and a general explanation for all of them but he finally admitted that it would be impossible for him to explain many of the items in detail. (R. 145–150, 161, 163–178.)

With respect to his failure to file an income tax return the petitioner testified that on May 15, 1937, he wrote to the Collector of Internal Revenue stating that he had not been able to contact his accountant and did not know whether his return had been filed or not. (R. 156.) The accountant's testimony is in sharp contrast to the contents of this letter, *supra*, p. 7. The petitioner further testified that in September or October of 1937 he telephoned the office of the Col-

lector, spoke to a young lady there, and asked her to note on his file that he expected a sum of money which would enable him to file his return and pay his tax within a month or so. (R. 156, 253–254.) The Collector's office contained no record of this call. (R. 39–41, 379–381.) Finally, the petitioner testified that in 1937 he sent to the Collector's office for 1936 income tax return blanks and that in March or April of 1938 he wrote to two or three brokerage houses for data in connection with his 1936 income tax return. (R. 156–157, 322–323, 335; see also R. 334.)

The principal defense, however, was based upon evidence as to the petitioner's physical condition. The petitioner himself testified that throughout 1936 and 1937 he was in serious ill health resulting from a constant fear of instant death caused in turn by the rejection of his applications for insurance policies on the ground of a heart condition. (R. 136–139.) Three physicians who had examined the petitioner testified on his behalf that during those years he was organically sound but was suffering from a fear psychosis or neurosis which would produce a neglect of ordinary business affairs and cause a tendency to procrastinate. (R. 190–202.) An expert psychiatrist, in response to a long hypothetical question, stated as his opinion that the subject of the question was suffering from a mental disorder known as psycho-neurosis which might cause procrasti-

nation and could interfere with the subject's will to carry out his opinions, wishes or desires. (R. 226–234.) All of the doctors testified, however, that the effects of the condition were entirely variable, causing interference with the ability to handle ordinary affairs at one time and not at a later time. (R. 195–201, 234–241, 353–357, 363; *cf.* R. 384–390.)

To meet this defense the Government cross examined the petitioner at length and in detail as to his activities in 1936 and 1937. In response to these questions he admitted that during this period he undertook and carried out a re-investment of his newly secured fortune, participated in the organization of corporations, participated in numerous directors' meetings, participated in the management of corporations engaged in the investment trust field, assisted in the registration of securities with the Securities and Exchange Commission, assisted in the preparation of contracts and the negotiation of loans, carried on extensive business correspondence, rendered legal advice to corporations, negotiated personal loans, made application for personal insurance policies and negotiated for and purchased a house. (R. 181–189, 206–226, 249, 252–281, 290–320; see also R. 365–376.)

With respect to the testimony as to the petitioner's physical condition the trial court charged the jury in part as follows (R. 405–406):

> Evidence has been presented that defendant's failure to file a return and pay the tax for 1936 was not part of a wilful attempt to evade or defeat the tax but was brought about by his physical and mental condition in 1937. Again I charge you that wilfulness is an element of the crime charged and that the Government has the burden of proving wilfulness beyond a reasonable doubt. It is for you to determine from all the facts and circumstances and the legitimate inferences which may be drawn therefrom whether the defendant's mental condition in 1937 was such that wilfulness to commit the crime charged cannot be ascribed to him. Unless you find beyond a reasonable doubt that the defendant's conduct was wilful, you must acquit the defendant.

The court further instructed the jury with respect to a willful attempt to evade a tax as follows (R. 402–403):

> Before you find the defendant guilty you must find that intentionally and wilfully he attempted to evade or defeat the tax.
>
> The law uses the word "attempt". Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well.
>
> The statute also uses the word "evade". That word has been defined to mean to

avoid by artifice, to avoid by device or stratagem, by concealment, by intentionally withholding a fact which ought to be communicated.

Such evasion must be differentiated from the use of legitimate means to minimize the tax. The latter is not a crime; but a wilful attempt to evade a tax is a crime.

The statute uses the word "wilfully". I will try to define that word. Wilfully often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right to so act.

Again with respect to wilfulness I will charge you, as I did with respect to attempt, that wilfulness is not limited to acts of commission—affirmative acts. It may describe omissions, or failure to take required action.

The court refused a request to instruct that an affirmative act was necessary to constitute a willful attempt. (R. 409.)

The petitioner was found guilty as charged. (R. 412.) A motion in arrest of judgment on the ground that the indictment failed to state facts constituting any crime was denied (R. 414),

and a sentence of a year and a day was imposed (R. 415). Upon appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 418–427), the judgment of conviction was affirmed (R. 429).

SUMMARY OF ARGUMENT

I. The petitioner was charged with willfully attempting to evade and defeat his income taxes for 1936 in violation of Section 145 (b) of the Revenue Act of 1936 and as a means thereof it was alleged that he willfully failed to file a return and pay a tax. The trial court instructed the jury that the statute did not require affirmative steps. In seeking a reversal of conviction the petitioner contends generally that Section 145 (b) does not include an attempted evasion by means of a willful failure to file a return and pay a tax but requires affirmative action.

a. Section 145 (b) of the Revenue Act of 1936 declares to be a felon he "who willfully attempts in any manner to evade or defeat any tax." The petitioner here received substantial income on which a tax was due. He was under a statutory duty to file a return and pay the tax but he failed to perform this duty. The jury concluded that his conduct was with the willful intent to evade the tax. His conduct was thus within the ordinary meaning of the language of the section and its inclusion is required by the sweeping phrase "in any manner."

The section clearly includes an attempt to evade by means of the filing of a false return. An attempt to evade by means of a failure to file a return is equally culpable and offers a greater obstruction to the administration of the tax laws. The petitioner's argument, however, would require the application of a lesser punishment and a shorter statute of limitations to the latter conduct. The practical application of the statute thus reinforces an interpretation of the section in accordance with its ordinary meaning. All decisions on the point have interpreted the section in accordance with the charge of the trial court here.

The inclusion in Section 145 (b) of an attempt to evade by means of a failure to file a return does not render the section inconsistent with Section 145 (a) which defines as misdemeanors the willful failure to file a return or to pay a tax. The offenses under the two sections differ in their essence, in their constituent elements and in their purposes. Furthermore, the word "attempts" in Section 145 (b) is not used in the same restricted sense as in common law "attempts" with the requirement of affirmative acts. The reasons for the common law rule are inapplicable in the presence of the affirmative statutory duty to file a return and pay a tax. Moreover, the existence of the affirmative duty renders the conduct of the petitioner a criminal attempt under the general principles controlling the common law offense.

b. The evidence here was sufficient to support the conviction whatever the interpretation of Section 145 (b). The record reveals the commission of affirmative acts of concealment of income by the petitioner and the jury concluded that his conduct was with the willful intent to evade. The concealment performed substantially endangered the public revenue.

c. The indictment alleged an offense under Section 145 (b) in the statutory terms and is likewise sufficient whatever the interpretation of the section. The allegations as to the means of attempted evasion were unnecessary. They were not prejudicial and hence may be disregarded as surplusage.

2. The judgment of the court below also is correct in affirming the District Court's instructions to the jury with respect to the element of willfulness, particularly as it related to the evidence regarding the petitioner's physical condition at about the time of the offense. The trial court fully and correctly instructed the jury with respect to the question of wilfulness, and there is no error in this respect.

ARGUMENT

I

THE PETITIONER WAS PROPERLY CONVICTED FOR A VIOLATION OF SECTION 145 (b) OF THE REVENUE ACT OF 1936

The petitioner was charged in a single count with willfully attempting to defeat and evade his

income tax for the year 1936 in violation of Section 145 (b) of the Revenue Act of 1936 (Appendix A, *infra*, p. 45). (R. 4–7.) The indictment alleged that as a means of so doing he willfully failed to file an income tax return and pay a tax for that year within the time required by law. (R. 7.) The evidence established, and it was conceded, that the petitioner received income in 1936 in a substantial amount and that a considerable tax was due thereon. (R. 15, 16–18, 21–22, 69, 71, 75–76, 80–88, 120–121.) It was likewise unquestioned that no return for 1936 had ever been filed by the petitioner and no tax paid. (R. 39–40, 44.) The detailed evidence as to the circumstances surrounding the petitioner's receipt and handling of income in that year and his failure to file a return was such that the jury might properly have found that his conduct in failing to file the return and pay the tax was carried out with the willful intent to evade the tax due. (R. 18–19, 21–22, 44–49, 53, 58–63, 69–71, 75–91.) The various elements of the crime charged, and particularly the requirements of willful intent within the meaning of Section 145 (b), were carefully stated to the jury in the charge of the trial court. (R. 401–407.) The trial court expressly charged that the petitioner could be found guilty only of a willful attempt to evade the income tax and could not be found guilty of the offenses of a willful fail-

ure to file a return or to pay a tax. (R. 403, 407.) Included in the charge were instructions that the statutory word "attempt" did not require affirmative steps and that the willfulness required might relate to a failure to take required action. (R. 402, 403.) These instructions were in accord with the prevailing interpretation of the statute in force in that circuit. *United States* v. *Miro*, 60 F. 2d 58 (C. C. A. 2d). The jury concluded that the petitioner was guilty. (R. 412.) The Circuit Court of Appeals unanimously affirmed the judgment of conviction, but Judge L. Hand indicated that as a new matter, uncontrolled by prior decisions, he would have decided otherwise. (R. 429.)

The petitioner here contends generally that Section 145 (b) of the Revenue Act does not include an offense which rests only on a failure to file a return and pay a tax and that some affirmative act is required before the statute is violated.[2] The petitioner defines this principal issue before this Court in terms of whether allega-

[2] This problem of statutory construction conceivably could be raised as a question of the sufficiency of the indictment, of the sufficiency of the evidence, or of the propriety of the court's charge. The petitioner frames his argument generally on all grounds. We believe, however, with the court below, that the statutory question is raised squarely only as a question of the correctness of the trial court's charge and accordingly we shall base our following argument on this premise. Thereafter we will indicate the other factors bearing on the sufficiency of the proof and the indictment.

tions and proof of the misdemeanors proscribed by Section 145 (a) can constitute the felony under Section 145 (b). Specifically he claims that the mere failure to file a return or pay a tax albeit willful, cannot alone sustain a conviction under the felony statute. In so stating his position, however, the petitioner has assumed the absence of those additional factors which we believe to be present and to complete the crime of willfully attempting to evade and defeat the tax. We shall hereinafter discuss these additional factors in detail.

(a) Insofar as material Section 145 (b) declares that "any person" shall be guilty of a felony "who willfully attempts in any manner to evade or defeat any tax imposed by this title". The petitioner here was under an affirmative duty by statute to file a return and pay a tax within a specified time. (R. 15; Revenue Act of 1936, Sec. 51, Appendix, *infra*, p. 44.) He did not file the return or pay the tax at the specified time or at any time. He in fact received substantial income and a considerable tax was due. The jury concluded from the circumstances surrounding the petitioner's conduct that he acted with the intent to willfully evade the tax due. If Section 145 (b) is read in the light of the ordinary meaning of its language, then the petitioner's conduct fell plainly within the statute, for it consisted precisely of a willful attempt to evade the tax.

The statute speaks of an attempt to evade "*in any manner.*" Certainly, a failure to file a return at all with the intent to evade is one of the most obvious means of attempted evasion. It, therefore, is necessarily within the statutory definition.

A consideration of the petitioner's argument as it would affect the practical application of the section reinforces the conclusion indicated by the language of the statute. The filing of a false return which omits a known item of income with the intent of thereby evading a tax is probably the most familiar example of violation of Section 145 (b). He who deliberately avoids filing any return with the same purpose is equally culpable for the same reason. *Cf. United States* v. *Troy*, 293 U. S. 58, 61–62. The petitioner's argument, however, would free the latter from guilt of this crime and would subject him only to the lesser punishments of a misdemeanor under Section 145 (a) of the Revenue Acts. Yet, the evader who files a return, even though it be incomplete, assists partially in the administration of the tax laws by indicating at the very least his existence as a taxpayer and by thereby affording an opportunity for the setting in motion of the governmental audit machinery. The taxpayer who files no return buries his guilt more deeply. His existence as a taxpayer must first be discovered be-

fore his guilt can be shown.[3] Particularly is this true if he be consistent in his failure to file and if his income be from illegal sources themselves concealed. So again, the petitioner's argument would reward the greater obstruction of the administration of the tax laws with lighter punishment. The reward is made even more peculiar since the lesser crime to which the petitioner would limit the failure to file carries a three-year statute of limitations, the greater crime a six-year period. (Internal Revenue Code, Section 3748.) The greater concealment should not be given the better opportunity to succeed. It is in the light of these considerations that the statute should be construed and applied.

Included in the category of those who often both consistently fail to file returns and conceal the sources of their income are the particularly flagrant violators of the income tax laws, the political grafters, gamblers, racketeers and gangsters. *Cf. O'Brien* v. *United States*, 51 F. 2d 193 (C. C. A. 7th), certiorari denied, 284 U. S. 673, *United States* v. *Miro, supra; United States* v. *Capone*, 93

[3] In this case the petitioner did reveal his existence as a taxpayer through his making application for extensions of time within which to file his return. (R. 40–49.) The problem of statutory construction here raised, however, is general in scope and the existence in the present record of these factors does not detract from the force of the above argument. These acts of the petitioner bear solely on the issue as to his intent and were considered by the jury in that respect under an express charge of the trial court. (R. 405, 407.)

F. 2d 840 (C. C. A. 7th), certiorari denied, 303 U. S. 651. If these evaders are to be subject only to the punishments of a misdemeanor and are to have the benefits of a short statute of limitations, the Government's law enforcement powers will be considerably curtailed at the very point that they are most needed. There is left as the normal subject of the more efficient weapon provided in Section 145 (b) the person who will pay a tax but who seeks to tailor the size of the tax to fit his personal desires. Indeed, the potential evader is thus invited not to file any return, since it would require little intelligence to choose the method carrying the lesser punishment and possibly the greater opportunity of success.

The legislative history of Section 145 (b) contains no discussion expressly dealing with the problem here raised. Section 145 (b) in its present form, however, first appeared as Section 1017 (b) of the Revenue Act of 1924 (Appendix A, *infra*, p. 43). Its appearance was an incident of a breakdown of a single section which had provided the same punishment for all income tax offenses. The new provisions, of which Section 1017 (b) was one, provided a careful gradation of the offenses and the punishments according to the seriousness of the crime. See H. Conference Rep. No. 844, 68th Cong., 1st Sess., p. 32 (1939–1 Cum. Bull. (Part 2) 300) (Appendix B, *infra*, p. 46). In making these gradations of crime Congress must have had in mind practical considera-

tions such as those mentioned and have intended similar punishments for conduct of equal culpability.[4]

The present question was first squarely raised in 1931 in *O'Brien* v. *United States*, 51 F. 2d 193 (C.

[4] In addition the breadth of the present Section 145 (b) is emphasized by the continued gradual enlargement of the provision by Congress. The original form appearing in Section 38 Eighth of the Corporation Excise Tax of 1909 and Section II F of the Income Tax Law of 1913 was "who makes any false or fraudulent return or statement with intent to defeat or evade the assessment." The provision continued in this form until the Revenue Act of 1918. See Revenue Act of 1916, Sec. 18; Revenue Act of October 3, 1917, Sec. 1209. In Section 1308 (b) of the 1918 Act the provision was amended to read "who willfully attempts in any manner to evade such tax." Compare H. R. 12863, 65th Cong., 2d Sess., Sec. 1308, as reported to the House (Union Calendar No. 258); H. R. 12863, 65th Cong., 3d Sess., Sec. 1308 (b), as reported to the Senate (Calendar No. 563), and as found in the Conference Committee Print; see H. Rep. No. 767, 65th Cong., 2d Sess., p. 39 (1939–1 Cum. Bull. (Part 2) 116); S. Rep. No. 617, 65th Cong., 3d Sess., p. 18 (1939–1 Cum. Bull. (Part 2) 130); H. Conference Rep. No. 1037, 65th Cong., 3d Sess., p. 90 (1939–1 Cum. Bull. (Part 2) 164) (Amendment No. 554). The 1918 form was re-enacted in Section 1302 (b) of the Revenue Act of 1921. As we have stated the provision was first enacted in its existing form in Section 1017 (b) of the Revenue Act of 1924 with the expansion to read "who willfully attempts in any manner to evade *or defeat* any tax imposed by this Act *or the payment thereof*" (italics supplied to indicate new matter). Compare H. R. 6715, 68th Cong., 1st Sess., Sec. 1017 (a) as reported to the House, Sec. 1017 (c) as reported to the Senate, and Sec. 1017 (b) as found in the Conference Committee Print; see H. Rep. No. 179, 68th Cong., 1st Sess., pp. 71–72 (1939–1 Cum Bull. (Part 2) 265); S. Rep. No. 398, 68th Cong., 1st Sess., p. 45 (1939–1 Cum. Bull. (Part 2) 297); H. Conference Rep. No. 844, *supra*.

C. A. 7th), certiorari denied, 284 U. S. 673, *supra*. The Circuit Court of Appeals for the Seventh Circuit after full consideration of the problem upheld a conviction under Section 145 (b) in similar circumstances. Without exception in every case in which the issue has since been raised or been implicit the decision has been the same. *Oliver* v. *United States*, 54 F. 2d 48 (C. C. A. 7th), certiorari denied, 285 U. S. 543; *United States* v. *Miro*, *supra*; *United States* v. *Commerford*, 64 F. 2d 28 (C. C. A. 2d), certiorari denied, 289 U. S. 759; *Hargrove* v. *United States*, 67 F. 2d 820 (C. C. A. 5th); *Bowles* v. *United States*, 73 F. 2d 772 (C. C. A. 4th), certiorari denied, 294 U. S. 710; *Kitrell* v. *United States*, 76 F. 2d 333 (C. C. A. 10th); *United States* v. *Capone*, 93 F. 2d 840 (C. C. A. 7th), certiorari denied, 303 U. S. 651.[*] Of all of the judges who have considered the point only two,

[*] The prosecution of Alphonse Capone involved the tax years 1925 to 1929, inclusive. He filed no return for any of those years. For the years 1928 and 1929 he was prosecuted on both felony and misdemeanor charges. As to the other years he was indicted only on felony charges. On his first appeal he did not raise the present issue, apparently because of the then recent decision in the same circuit in the *O'Brien* case, *supra*. See *Capone* v. *United States*, 56 F. 2d 927 (C. C. A. 7th), certiorari denied, 286 U. S. 553. At a much later time, he raised the issue on an application for vacation of a part of the sentence imposed. The issue was presented under the contention that the verdict was inconsistent. The application was denied by the District Court and the judgment was affirmed by the Circuit Court of Appeals in the decision cited in the text.

Judge Alschuler in the *O'Brien* case and Judge L. Hand below, have expresed an opinion to the contrary. On the basis of these decisions, between 1930 and 1942 the Department of Justice has instituted criminal proceedings under Section 145 (b), or corresponding sections, where no return had been filed, which have resulted in felony indictments and convictions in 83 cases.[6] During the period in which these decisions and this administrative practice have remained in effect Section 145 (b) has been many times reenacted in identical language. The publicity given a number of these cases makes reasonable the assumption that Congress was aware of this administrative practice when re-enacting the statute.[7]

To overcome this long established line of decisions and to exclude from the statute a course of

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[6] A summary of the character of the defendants involved and of the results of these criminal proceedings instituted, in the period between 1930 and 1942, as revealed by the files of the Department, is as follows:

Persons Indicted	Aggregate Tax Years involved	Convictions by Verdict	Convictions by Pleas of Guilty	Convictions by Pleas of nolo contendere	Aggregate Years of Imprisonment Imposed	Aggregate Fines Imposed	Number of Defendants Engaged in Illegal Business or Conduct
83	285	19	54	10	79	$148,084	45

[7] In addition to the prosecution of Alphonse Capone the Department of Justice prosecuted in the year 1934 the notorious Arthur Flegenheimer, alias "Dutch" Schultz, on charges of willfully attempting to defeat and evade income taxes for the years 1929, 1930, and 1931, by failure to file returns for those years. However, the defendant was acquitted by the verdict of the jury.

conduct included within the ordinary meaning of its language, only two reasons have been suggested. The first is that of Judge Alschuler in the *O'Brien* case. The second was that unsuccessfully presented in the *Miro* case and emphasized by the petitioner here.

1. Judge Alschuler in the *O'Brien* case argued that if Section 145 (b) be interpreted in the manner upheld by the majority of his court it created an offense having identical elements as to intent and conduct with the misdemeanor defined in Section 145 (a) of the Act; that Section 145 (a) was specific while Section 145 (b) was in general terms and, hence, that Section 145 (b) must be interpreted in a manner to exclude the specific crime defined in Section 145 (a).* We believe,

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*The further argument of Judge Alschuler based on a statement of this Court in *United States* v. *Noveck*, 273 U. S. 202, 206, is inconclusive as to the problem here. This statement in the *Noveck* decision was made by way of illustration and is to the effect that the making of a false return, without presentation thereof, does not constitute an attempt to evade the tax. Taken in its context this statement plainly refers to an attempt to evade by means of the filing of a false return, which cannot in itself constitute an offense until the false return is filed. Thus the statement was contrasted with the crime of making a false affidavit, which is completed on the execution of the return. In making the statement the Court does not appear to have considered the situation presented by a failure to comply with the statutory duty of filing a return. This interpretation of the statement is made more certain by the fact that the Court was there dealing with an earlier statute in which the willful failure to file a return and the attempt to evade were combined in a single section with an identical punishment.

however, that the very premise of this argument is fallacious. Section 145 (a) provides in part that any person required to make a return "who willfully fails to * * * make such return * * * at the time or times required by law" shall be guilty of a misdemeanor. The physical element common to this crime and to the interpretation of Section 145 (b) as expressed in the charge of the trial court below is the failure to file a return.* This without more is not an offense under either section. Other circumstances must be added, and the circumstances under each section are different. Thus, apart from the requisite intent, to constitute the offense under Section 145 (a) there must be shown a statutory duty to file a return (arising in the commonest instance from the receipt of a specified amount of gross income) and a failure to file the return. (Revenue Act of 1936, Sec. 51.) Again, apart from intent, to constitute the crime under Section 145 (b) there must be shown these same elements but in addition there must be established an unre-

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The instant problem arose with its present force only with the later separation of the offenses and the gradation of the punishments. Moreover, whatever the meaning of this single sentence in the *Noveck* case, the decision itself and its rationale lend most powerful support to our contention here.

*Even this similarity is qualified. The crime under Section 145 (a) is failure to file on time. Under Section 145 (b) as interpreted below the crime requires a failure to file at all.

ported net income and a tax due and unpaid. This in turn requires reference to all of the provisions and factors relating to exemptions, deductions and credits. From the standpoint of physical elements, therefore, the offenses are not identical but rather the central element of each crime is distinct. Section 145 (b) may include the elements of Section 145 (a) but its violation arises only with the existence of additional factors.

Similarly, we believe that Judge Alschuler is incorrect in his assumption that the requisite intent under both sections is the same. Whatever else the statutory word "willfully" may include, at the very least in this setting it requires knowledge of the elements of the crime. Thus under Section 145 (a) it need only be shown that the defendant knew of his receipt of *gross* income in an amount sufficient to require his filing of a return. Under Section 145 (b) it must be shown that the defendant knew of his receipt of *net* income on which a tax was due. Further, although the word "willfully" may admit of a general definition applicable to each section (*cf. United States* v. *Murdock*, 290 U. S. 389), in practice the infinite variety of motivation which may impel the human mind will yield a sharp differentiation between the two offenses. The Government's experience in enforcing these criminal provisions has demonstrated that the willful failure to file a return or pay a tax, even when a tax is clearly due, is not necessarily

motivated by a desire to evade the tax. For the information of the Court we cite a few of the examples which are contained in the files of the Department of Justice:

A taxpayer who had developed a personal antagonism to the local taxing officials refused because of this prejudice to file a return; a taxpayer, proclaiming himself a leader of a tax revolt, refused to file a return until there had been a change of the national administration; a taxpayer with strong pacifist tendencies refused to pay a tax which in any part would be devoted to the prosecution of the war.

These persons all deliberately and wilfully violated the duty imposed upon them under the Revenue Acts and hence were clearly guilty of the misdemeanors specified in Section 145 (a). But it was equally clear that whatever their motivation, their conduct was not designed to defeat or evade a tax. Accordingly the felony provisions of Section 145 (b) could have no application to their respective cases. It is reasonable to suppose that Congress had such cases in mind in providing more drastic punishment for the willful crime of evading a tax than for the obstinate refusal for other purposes to comply with the administrative provisions of the Act. Judge Alschuler was thus in error in concluding that Section 145 (a) requires an intent to defraud the Government. *Cf. United States* v. *Murdock, supra.*

Moreover, apart from the constituent elements of the offenses under the two sections, they differ in their very essence and exist for separate purposes. The essence of the crime under Section 145 (b) is the endeavor to defraud the Government of a tax due. See *Emmich* v. *United States*, 298 Fed. 5, 9 (C. C. A. 6th), certiorari denied, 266 U. S. 608. The filing of a false return, the failure to file any return, the concealment of sources of income or any one of the variety of possible methods of attempting to evade are simply means to the end, not the end itself. Thus, as we have emphasized, Section 145 (b) expressly provides that the attempted evasion may be "in any manner." On the other hand, the essence under Section 145 (a) is the mere failure to comply with the statutory duty to file a return at the specified time. Hence this section speaks of a failure to file "at the time or times required by law or regulations." Under it, a stubborn taxpayer who conceived that the denial of a requested extension of time within which to file a return was unjust and who willfully filed his return late would be guilty of a misdemeanor; he clearly would not be guilty of a felony under Section 145 (b). Thus, the purpose of Section 145 (a) is to secure the enforcement of the administrative provisions of the income tax laws, whereas, the purpose of Section 145 (b) is to secure the enforcement of the substantive provisions of those laws.

Finally, a comparison of the legislative histories of Sections 145 (a) and 145 (b) demonstrates that the two provisions have developed side by side but in entirely different fashion and have always been regarded by Congress as distinctive provisions having separate purposes.[10] The parallel

[10] We have previously described the development of Section 145 (b), *supra*, pp. 23–24. The original form of Section 145 (a) as it appeared in Section 38 Eighth of the 1909 Act and in Section II F of the 1913 Act was a mere money penalty for the taxpayer who "shall refuse or neglect to make a return at the time or times hereinbefore specified". Section 18 of the 1916 Act and Section 1209 of the Act of October 3, 1917, continued the provision in substantially identical form; the 1917 Act, however, made the provision applicable to the payment of tax and the supplying of required information. In the 1918 Act the provision was considerably altered. In Section 1308 (a) of that Act a money penalty was made applicable to the person "who fails to pay, collect, or truly account for any pay over any such tax, make any such return, or supply any such information at the time or times required by law or regulation". Section 1308 (b) added a provision making any person guilty of a misdemeanor "who willfully refuses to" perform the various duties specified in sub-section (a). See citations to legislative materials, *supra*, footnote 4, p. 24. Sections 1302 (a) and (b) of the 1921 Act made no changes in the corresponding sections of the 1918 Act. As with Section 145 (b) the modern form of Section 145 (a) first appeared in the 1924 Act as Section 1017 (a). In this act the money penalty for a failure to file a return, etc., without a willful intent was dropped entirely from the statute. The misdemeanor provision for willful neglect to perform the various statutory duties was changed from "willfully refuses" to "willfully fails." See citation to legislative materials, *supra*, footnote, p. 24; see also Cong. Record, Vol. 65, Part 7, pp. 7143–7145.

development of the sections thus negatives the suggestion that Section 145 (a) was intended to, or does, limit in any way the scope and broad language of Section 145 (b). Plainly, the provision for willful failure to file as first enacted in Section 1017 (a) of the 1924 Act was simply a combination of the prior provisions for a failure to file without willfulness and a willful refusal and was not a provision carved out of the already existing offense of a willful attempt to evade. Instead, the latter provision, now 145 (b), was at the same time not only re-enacted in Section 1017 (b) but was expanded, *supra,* footnote, p. 24.

It follows, therefore, that the offenses under each section differ in their constituent elements, in the essence of the offense and in the purpose of the provision. An interpretation of Section 145 (b) to include an attempt to evade by means of a failure to file a return thus does not coincide with the express provisions of Section 145 (a) and no limitation on the general language of Section 145 (b) is required. The jury here was not left in doubt as to the distinction between the two sections for the petitioner himself requested and the judge carefully charged the jury, both in his own language and in the language of the requests, that the defendant was not charged with a willful failure to file a return or to pay a tax and could not be found guilty of those offenses but that the only crime of which he might be found guilty was a

willful attempt to evade the income tax. (R. 392–393, 403, 407.) The charge defined the offense under Section 145 (b) and only that offense. (R. 397, 401–406.)[11]

2. The second reason suggested for limitation of Section 145 (b), which was unsuccessfully advanced in the *Miro* case and is emphasized by the petitioner here, is that the word "attempts" in Section 145 (b) must be interpreted in accordance with the word of art "attempts" at common law and hence to constitute an offense must require some affirmative action toward completion of the intended crime. The requirement of affirmative action by the common law, however, arose from the undesirability of punishment simply for an evil mind. See Holmes, *The Common Law* (1881) 65–70, Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 Yale L. J. 789–831 (1940). Only if some action were taken was the peace actively endangered or harm to person or

[11] The substance of this discussion is equally applicable to the petitioner's further contention that the charge here is simply a combination of the two misdemeanors under Section 145 (a) of a willful failure to file a return and a willful failure to pay a tax. They demonstrate that the offense charged is not a mere combination but a distinct entity. However this may be, even a combination normally has characteristics other than the mere total of those of its constituent parts. There is no incongruity in defining as a greater crime the simultaneous commission of two lesser crimes; consider, for example, the crime of murder resulting from homicide in the course of the commission of a felony.

property threatened. Further, only then was it possible to prove intent from physical circumstances. The common law crimes were primarily crimes of action and few, if any, affirmative duties with criminal consequences rested on the citizen.

Under Section 145 (b) the situation is entirely reversed. The Revenue Acts impose on the taxpayer an affirmative duty to act by filing a return. His failure to perform this duty is a physical fact, not merely a state of mind, and at once endangers the public revenue. His conduct is susceptible of physical proof and permits a showing of his intent to evade the tax. None of the reasons, therefore, which may have led to the rule of common law attempts is applicable to the modern statutory crime of attempted tax evasion. No factor in the history or purpose of the legislation requires an incorporation into the statute of the complexities of common law attempts. Rather, the purpose, practical application and ordinary meaning of the statute all oppose such incorporation. *Cf.* Arnold, *Criminal Attempts—The Rise and Fall of An Abstraction,* 40 Yale L. J. 53 (1930).

Moreover, it does not follow that an incorporation of modern principles of common law attempts into Section 145 (b) would require the exclusion from the statute of an attempt to evade by means of a failure to file a return. In the presence of an affirmative duty to act which is performed by other taxpayers, conduct such as that of the peti-

tioner in failing to act becomes in a very real sense positive physical action capable of being visually discerned. Modern analyses of the subject of criminal attempts measure the extent to which affirmative action must proceed to result in an offense, in terms of the objective social harms inherent in the defendant's conduct as considered in the light of all of the circumstances surrounding that conduct. Hall, *supra*, pp. 812–840; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 837–859 (1928). The conduct here in question meets all of the requirements of objective social harm and indeed creates the maximum social harm proscribed by the revenue laws. A reversal of this conviction, therefore, would require not only an incorporation of the rules of common law attempts into Section 145 (b) but a distortion of the principles underlying the common law rules as well. *Cf.* Kirchheimer, *Criminal Omissions*, 55 Harv. L. Rev. 615 (1942), especially pp. 619–620, 636, 638–639.

In view of the anomaly in the practical application of the statute which we have previously described as resulting from the petitioner's interpretation of Section 145 (b), we may properly ask in testing the petitioner's argument how the section must be drafted to include conduct of the character here in question. The section could not be phrased in terms of a completed evasion since under the statute of limitations applicable to the civil tax

liability the tax may be collected however late the evasion be discovered.[12] The mere discovery of the attempt thus tends to prevent its becoming a completed evasion. Again, the crime of attempted evasion must be stated in general terms since the possible means of evasion are myriad, and Congress could not, with safety, undertake to catalog all possible means of evasion. Would the section then be phrased "who willfully attempts in any manner, including a failure to file a return as required by law or regulations made under authority thereof, to evade or defeat any tax"? But if the present phrase "in any manner" has any meaning, it must mean precisely what it says and include any possible specific means. The literary futility of any satisfactory amendment demonstrates the all-inclusive character of the present statute.

The petitioner's further contention that the statute as interpreted below is invalid for uncertainty is without substance. This Court has recently considered such a contention in circumstances even more abstruse for a layman and has concluded that the standards of the statute are of sufficient definiteness. *United States* v. *Ragen*, 314 U. S. 513. In so far as the general problem here

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[12] Section 276 (a) of the Internal Revenue Code provides as follows:

> *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

raised is concerned, the statute is plain to the lay mind. The interpretation of the statute to include the petitioner's conduct is of long standing and any indefiniteness results only from the petitioner's endeavor to incorporate the common law complexities into the statute. The prospective evader might then rightly ask himself, if he planned to file no return, what affirmative acts would carry him from a misdemeanor to a felony. Only an investigation of the library of technical writings on the subject of common law attempts could even suggest an answer to his question. Further, Section 145 (b) is not invalid as interpreted below in that it may apply to a fact situation to which Section 145 (a) is also applicable. Section 145 (b) contains additional elements which are sufficient to form the basis for a separate offense. *Albrecht* v. *United States*, 273 U. S. 1; *United States* v. *Noveck*, 273 U. S. 202, *supra*; *O'Brien* v. *United States*, *supra*.

b. Contrary to the petitioner's contention, the evidence here was sufficient to support the conviction under any interpretation of Section 145 (b). Neither the common law of attempts nor the suggested interpretation of the section in the dissent in the *O'Brien* case would require any specific affirmative act for the offense. Any effort toward completion of the crime which substantially endangers the revenue would be sufficient. *Cf.* Holmes, *supra*, pp. 68–70. The record in this case discloses that the petitioner did take affirmative

action to conceal his receipt of income. He insisted on and secured the payment in cash of an obligation normally paid by check. (R. 16–19, 21–22, 69–71.) He deposited the cash not in his own bank account but in the account of his wife. (R. 71, 88, 105, 143.) He shortly thereafter withdrew the bulk of the money from this account and deposited portions of it in several other accounts in the names of members of his family, including two accounts opened with these deposits. (R. 88–91, 143–144.) Finally, within another short interval, a major part of the money was withdrawn from various of the accounts and used to purchase a life insurance company annuity. (R. 89–90, 144.) In his defense he contended that these were not acts of concealment but resulted from motives of innocence. (R. 143–144, 159–161.) The acts, however, resulted in concealment, whatever the degree thereof, and were subject to the interpretation that they were intended for the purpose of concealment. The verdict of the jury makes proper at this time a conclusion that the acts were acts of concealment. Particularly is this true since the trial court directly charged that these acts might be considered by the jury in testing the petitioner's intent. (R. 405.) The concealment resulting from these acts continued in effect without correction at the time the tax obligation arose. From its inception it presented a danger to the revenue, a danger which

gathered in force as the events fixing the tax liability transpired.[12]

Similarly, the circumstances surrounding the petitioner's conduct as revealed by the evidence justified the jury's conclusion that the petitioner intended not merely to fail in his duty to file a return but to evade the tax due on his unreported income. The evidence thus does not merely prove a willful failure to file a return or to pay a tax; it establishes a willful attempt to evade the tax.

c. As with the proof, the indictment here was sufficient whatever the interpretation of Section 145 (b). The indictment alleged a complete charge in statutory terms. This was sufficient without the alleging of any means of evasion whatever. *Capone* v. *United States*, 56 F. 2d 927 (C. C. A. 7th), certiorari denied, 286 U. S. 553, *supra;* see also *United States* v. *Scharton*, 285 U. S. 518, 521; *cf. United States* v. *Simmons*, 96 U. S. 360; *Durland* v. *United States*, 161 U. S. 306, 314–315; *United States* v. *Gooding*, 12 Wheat. 460, 473–475; *People* v. *Bush*, 4 Hill (N. Y.) 133.

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[12] We believe this argument disposes of any problems of the correlation of times and the application of the statute of limitations. Again, however, we submit that the very necessity of treating these additional problems created by the petitioner's interpretation of Section 145 (b) illustrates the unsoundness of his general contention. Only if the section is interpreted to include an attempt to evade by means of a failure to file a return does it become a simple, cohesive provision capable of carrying out its broad terms.

As shown by the *Capone* case, *supra*, the allegations of the means of commission of the offense therefore clearly are "surplusage" in the indictment, and are not necessary to constitute a valid indictment. *Crapo* v. *United States*, 100 F. 2d 996, 998 (C. C. A. 10th), involved a prosecution of the defendants for unlawfully having in possession a sawed-off shotgun, transferred in violation of statute "in that they had failed to pay the tax of $200 on such firearm, to secure stamps showing the payment of such tax," and to affix stamps and furnish a written order for that purpose. The court held, as it stated (p. 1001):

> That portion of count 2 which charged Crapo with the failure to pay the tax and to affix the appropriate stamps to the order may be disregarded as surplusage. * * *

See also *Farley* v. *United States*, 269 Fed. 721, 724 (C. C. A. 9th). It is well established, of course, that an indictment containing unnecessary allegations must be sustained, if legally sufficient, unless prejudicial to the defendant. *Smith* v. *United States*, 17 F. 2d 723 (C. C. A. 8th), certiorari denied, 274 U. S. 762. Thus, in the instant case the allegation of failure to file a return or pay any tax may be considered as surplusage to the charge of attempted tax evasion, and the indictment was without error or imperfection. If any imperfection did exist it was as to form only, and the case falls within the purview of Section 1025 of the

Revised Statutes, which directs that "No indictment * * * shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." *Dunbar* v. *United States*, 156 U. S. 185, 191; *Breese* v. *United States*, 226 U. S. 1, 11.

II

THE TRIAL COURT FULLY AND CORRECTLY INSTRUCTED THE JURY REGARDING THE ELEMENT OF WILLFULNESS

With respect to petitioner's further contention that the trial court erred in failing to give certain requested instructions in connection with the element of willfulness (Br. 15), as shown by the Statement, *supra*, pp. 13, 14, the trial court fully, fairly, and correctly instructed the jury in this respect. See *United States* v. *Murdock*, 290 U. S. 389. Apparently referring to requested instructions Nos. 21, 22, 23 and 24 (R. 394), the petitioner is in error in suggesting and stating that the trial court failed to give these instructions or any instructions at all upon the subject. See Statement, *supra*, pp. 13, 14; see also R. 401. The instructions requested by petitioner were equivalent to a direction that if the jury found that the petitioner's physical condition was as alleged, the jury must find that petitioner's omissions were not willful and that petitioner was not guilty. The

question of willfulness is a jury question (*United States* v. *Murdock, supra,* p. 396) and petitioner was not entitled to have the court instruct the jury as to what weight the jury must give to particular items of evidence. The court properly refused to single out and overemphasize such expert medical testimony. *Perovich* v. *United States,* 205 U. S. 86, 92.

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1942.

APPENDIX A

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 1017. * * *

(b) Any person required under this Act to collect, account for and pay over any tax imposed by this Act, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any person who willfully (1) aids or assists in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, authorized or required by the internal revenue laws, or (2) procures, counsels, or advises the preparation or presentation of such return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 51. INDIVIDUAL RETURNS.

(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) *Husband and wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

* * * * *

SEC. 145. PENALTIES.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such rec-

ords, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

Revised Statutes, as amended:

SEC. 1025. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *. (U. S. C., Title 18, Sec. 556.)

APPENDIX B

H. Conference Rep. No. 844, 68th Cong., 1st Sess., p. 32 (1939–1 Cum. Bull. (Part 2) 300):

> Amendment No. 242: The Senate amendment provides a complete system of penalties in lieu of those contained in section 1017 of the House bill. Subdivisions (a) and (b) correspond to subdivision (a) of this section of the House bill with the following changes: The penalty provided in subdivision (a) of the Senate amendment applies to a wilful failure to comply with the requirements of the law therein set forth; in the House bill the penalty applied to a wilful refusal. Wilful failure to collect, account for, and pay over any tax imposed by the act, or a wilful attempt to evade such tax, is made a felony with a fine of not over $10,000 and imprisonment for not over five years or both, instead of a misdemeanor as in the House bill. A wilful attempt to defeat the tax or the payment thereof has been added to the list of offenses specified in subdivision (b). Subdivision (c), which was not contained in the House bill, provides a penalty for the offense of aiding in the preparation, presentation, procurement, counseling, or advising of a false or fraudulent return, affidavit, claim, or document authorized or required by the internal revenue laws. The House recedes.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

No. 278.—October Term, 1942.

Murray R. Spies, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 11, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner has been convicted of attempting to defeat and evade income tax in violation of § 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703, now § 145(b) of the Internal Revenue Code. The Circuit Court of Appeals found the assignment of error directed to the charge to the jury the only one of importance enough to notice. The charge followed the interpretation put upon this section of the statute in *O'Brien* v. *United States*, 51 F. 2d 193 (C. C. A. 7), and *United States* v. *Miro*, 90 F. 2d 58 (C. C. A. 2), which followed it. The Circuit Court of Appeals affirmed, stating that "we must continue so to construe the section until the Supreme Court decides otherwise." 128 F. 2d 743. One Judge said that as a new matter he would decide otherwise and expressed approval of the dissent in the *O'Brien* case. As the construction of the section raises an important question of federal law not passed on by this Court; we granted certiorari. — U. S. —.

Petitioner admitted at the opening of the trial that he had sufficient income during the year in question to place him under a statutory duty to file a return and to pay a tax, and that he failed to do either. The evidence during nearly two weeks of trial was directed principally toward establishing the exact amount of the tax and the manner of receiving and handling income and accounting, which the Government contends shows an intent to evade and defeat tax. Petitioner's testimony related to his good character, his physical illness at the time the return became due, and lack of willfulness in his defaults, chiefly because of a psychological disturbance, amounting to something more than worry but something less than insanity.

Section 145(a) makes, among other things, willful failure to pay a tax or make a return by one having petitioner's income at the time or times required by law a misdemeanor.[1] Section 145(b) makes a willful attempt in any manner to evade or defeat any tax such as his a felony.[2] Petitioner was not indicted for either misdemeanor. The indictment contained a single count setting forth the felony charge of willfully attempting to defeat and evade the tax, and recited willful failure to file a return and willful failure to pay the tax as the means to the felonious end.

The petitioner requested an instruction that "You may not find the defendant guilty of a willful attempt to defeat and evade the income tax, if you find only that he had willfully failed to make a return of taxable income and has willfully failed to pay the tax on that income." This was refused, and the Court charged that "If you find that the defendant had a net income for 1936 upon which some income tax was due, and I believe that is conceded, if you find that the defendant willfully failed to file an income tax return for that year, if you find that the defendant willfully failed to pay the tax due on his income for that year, you may, if you find that the facts and circumstances warrant it find that the defendant willfully attempted to evade or defeat the tax." The Court refused a request to instruct that an affirmative act was necessary to constitute a willful attempt and charged that "Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well."

It is the Government's contention that a willful failure to file a return together with a willful failure to pay the tax may, with-

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[1] "Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

[2] "Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

out more, constitute an attempt to defeat or evade a tax within § 145(b). Petitioner claims that such proof establishes only two misdemeanors under § 145(a) and that it takes more than the sum of two such misdemeanors to make the felony under § 145(b). The legislative history of the section contains nothing helpful on the question here at issue, and we must find the answer from the section itself and its context in the revenue laws.

The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures rather than upon a system of withholding the tax from him by those from whom income may be received. This system can function successfully only if those within and near taxable income keep and render true accounts. In many ways taxpayers' neglect or deceit may prejudice the orderly and punctual administration of the system as well as the revenues themselves. Congress has imposed a variety of sanctions for the protection of the system and the revenues. The relation of the offense of which this petitioner has been convicted to other and lesser revenue offenses appears more clearly from its position in this structure of sanctions.

The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist of additions to the tax upon determinations of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt. The latter consist of penal offenses enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other. *Helvering* v. *Mitchell*, 303 U. S. 391.

The failure in a duty to make a timely return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, is punishable by an addition to the tax of 5 to 25 per cent thereof, depending on the duration of the default. § 291 of the Revenue Act of 1936 and of the Internal Revenue Code. But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145(a). Punctuality is important to the fiscal system, and these are sanc-

tions to assure punctual as well as faithful performance of these duties.

Sanctions to insure payment of the tax are even more varied to meet the variety of causes of default. It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appear from the number who make overpayments.[3] It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. §§ 292 and 294 of the Revenue Act of 1936 and of the Internal Revenue Code. If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is 50 per cent thereof. § 293 of the Revenue Act of 1936 and of the Internal Revenue Code. Willful failure to pay the tax when due is punishable as a misdemeanor. § 145(a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. § 145(b). The question here is whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor.

A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145(b) meant no more than the same derelictions it had just defined in § 145(a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider

[3] The following statistics are given by the Commissioner of Internal Revenue for the fiscal year 1941: 73,627 certificates of overassessment of income tax issued, for 39,730 of which no claims had been filed; 236,610 assessments of additional income taxes made; 871 investigations made of alleged evasion of income and miscellaneous taxes, with recommendation for prosecution in 239 cases involving 446 individuals, of whom 192 were tried and 156 convicted. The total number of income tax returns filed was 16,052,007, of which number 7,867,319 reported a tax. Annual Report of the Commissioner of Internal Revenue (1941), pp. 17, 20, 21, 22, 52, 108.

this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

Had §145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of § 145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor we think argues strongly against such an interpretation.

The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law "attempt".[4] The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impos-

[4] Holmes, The Common Law, pp. 65-70; Hall, Criminal Attempt—A Study of Foundations of Criminal Liability, 49 Yale Law Journal 789; Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 Yale Law Journal 53.

sibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner". By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records. Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury. If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to

pay the tax, to constitute a willful attempt to defeat and evade tax, we would consider conviction of a felony sustainable. But we think a defendant is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference, the defendant should be acquitted.

The Government argues against this construction, contending that the milder punishment of a misdemeanor and the benefits of a short statute of limitation should not be extended to violators of the income tax laws such as political grafters, gamblers, racketeers, and gangsters. We doubt that this construction will handicap prosecution for felony of such flagrant violators. Few of them, we think, in their efforts to escape tax stop with mere omission of the duties put upon them by the statute, but if such there be, they are entitled to be convicted only of the offense which they have committed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.